

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

September 20, 2004

In Reply Refer To:
6841 (220) P

EMS TRANSMISSION 09/24/2004
Information Bulletin No. 2004-148

To: AFO's

From: Assistant Director, Renewable Resources and Planning

Subject: Involving the "Applicant" in the Consultation Process as Established by Section 7 of the Endangered Species Act (ESA).

Program Area: Rangeland Management, Recreation Management, Realty and Ownership Management, Energy and Minerals Management, Forest Management, and Threatened and Endangered Species Management.

Purpose / Background: The purpose of this Information Bulletin is to clarify applicable law, regulation, and policy for recognizing applicants in the consultation process established by Section 7 of the ESA. By restating this direction, BLM seeks to ensure that applicants are afforded an opportunity to comment and contribute relevant data throughout the consultation/conferencing process.

Under Section 7 of the ESA, the BLM is required to consult with the U.S. Fish and Wildlife Service (FWS) and/or National Oceanic and Atmospheric Administration Fisheries (NOAA), formerly National Marine Fisheries Service (NMFS) jointly referred to as "the Services" in this IB, on actions that it permits, licenses, funds, or otherwise authorizes in whole or in part, to ensure that these actions will not jeopardize the continued existence of any listed species. The BLM also must confer with the Services on any agency action that is likely to jeopardize the continued existence of any species proposed for listing or result in the adverse modification of proposed critical habitat. As the Action Agency, the BLM is ultimately responsible for the consultation process and determining the role of the applicant during the consultation process. Section 7(a)(3) of the ESA provides that:

"Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species may be present in the area affected by his project and that implementation of such action will likely affect such species."

The Term “applicant” refers to “any person... who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action” (50 CFR 402.02). “The term person means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States ESA (Section 3(12)).” In addition, the ESA defines conferencing as:

“... a process of early interagency cooperation involving informal or formal discussions between a Federal agency and the Services pursuant to section 7(a)(4) of the Act regarding the likely impact of an action on proposed species or proposed critical habitat. Conferences are: (1) required for proposed Federal actions likely to jeopardize proposed species, or destroy or adversely modify proposed critical habitat, (2) designed to help Federal agencies identify and resolve potential conflicts between an action and species conservation early in a project's planning; and (3) designed to develop recommendations to minimize or avoid adverse effects to proposed species or proposed critical habitat. [50 CFR §402.02, 50 CFR §402.10]”

As the Action Agency, the BLM is responsible for making the determination on the need to consult and to notify the applicant early in the process that a conference or consultation with the Services is required. Additionally, the BLM notifies the applicant that they have a right to be an “applicant” upon their written request to BLM. Upon receiving written notice from the applicant, the BLM then provides prompt written notification to the Service recognizing an “applicant” as a part of the informal or formal consultation process.

(refer to <http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm>)

The ESA consultation/conferencing process begins in the early phases of the NEPA process and concludes before the final decision is completed and signed. A biological assessment (BA) is prepared by the BLM to document the analysis. The applicant will be included in the BA process. In addition, the BLM and the applicant should remember that written communications are generally between the applicant and the BLM and NOT directly between the applicant and Services. The following are a few of the high points from the BLM’s Manual Section 6840--Special Status Species Management, and more detail and specificity is included in 6840 Section 21E.1-7.f (refer to <http://www.blm.gov/nhp/efoia/wo/manual/6840.pdf>) Specifically, the individuals with applicant status will be given the opportunity to be involved in:

- The modifications suggested by the Services during informal consultations in order to avoid the likelihood of adverse effects to listed species or critical habitat, 50 CFR 402.13(b).
- The submission of information to the Services for consideration during the consultation, 50 CFR 402.14(d).
- Ensuring that they make no irreversible or irretrievable commitment of resources with respect to the action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2), 50 CFR 402.09.
- The consultation timeline. The Services have 30 days to notify the BLM of any data gaps in the BA. Once the BA is considered by the Services to be complete, the “consultation clock” begins and the Service has 90 days to formulate a biological opinion (BO). The

- Services and the BLM may mutually agree to extend the consultation deadline beyond 90 days provided that the Services submit to the applicant, before the close of the 90 days, a written statement setting forth:
 - (1) The reasons why a longer period is required;
 - (2) The information that is required to complete the consultation, and;
 - (3) The estimated date on which the consultation will be completed, 50 CFR 402.14(e). A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant.
- Discussions of the Services' review and evaluation, including the basis for any finding in the BO, and reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the BLM and the applicant can take to avoid violation of section 7(a)(2). The Services will utilize the expertise of the BLM and the applicant in identifying these alternatives, 50 CFR 402.14(g)(5).
- The comment process when the Services complete the draft BO. The BLM will provide a copy of the draft opinion. All comments on the draft BO must be submitted to the Services through the BLM, although the applicant may send a copy of their comments directly to the Services, 50 CFR 402.14(g)(5).
- At the conclusion of the formal consultation process, the Services shall deliver a BO to the applicant, 50 CFR 402.14(e).

Following the receipt of concurrence, a BO, or a conference report from the Services; and completion of the NEPA analysis, the appropriate authorization may be issued by the BLM under the applicable regulations.

Time Frame: Effective immediately.

Budget Impact: Implementing this IB should have a minimal impact on Field Offices with permit/lease/grant etc. issuance and renewals that require consultation with Fish and Wildlife Service/ National Oceanic and Atmospheric Administration-Fisheries in accordance with Section 7 of the Endangered Species Act. Offices that are not currently following this guidance could see a significant additional workload increasing the time and costs of the authorization.

Manual/Handbook Sections Affected: 43 CFR 4130.2, 43 CFR 4160.1,3,4 Manual Section 6840.21.1.5.k Rel. 6-121; 1/19/01

Coordination: This Instruction Bulletin was coordinated between the Rangeland Resources, Soils, Water and Air Group (WO 220), Fish Wildlife and Botany Group (WO 230), Forests and Woodlands Group (WO 270), Recreation Group (WO 250), Lands, Realty and Cadastral Survey Group (WO 350), Fluid Minerals Group (WO 310), and the Solicitor's Office.

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